

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

DANIEL HURLBUT
ADC #658898

PLAINTIFF

v.

5:19-cv-00173-BSM-JJV

WENDY KELLEY, Director, Arkansas
Department of Correction, *et al.*

DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The details of any testimony desired to be introduced at the new hearing in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the new hearing.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing. Mail your objections and “Statement of Necessity” to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

Daniel Bryce Hurlbut (“Plaintiff”) was an inmate at the Grimes Unit of the Arkansas Department of Correction when he filed this action *pro se* pursuant to 42 U.S.C. § 1983. (Doc. Nos. 1, 2.) On October 2, 2019, Defendants Kelly and Colbert filed a suggestion of death in this case informing the Court that Plaintiff died on September 28, 2019. (Doc. No. 36.) Plaintiff’s death was confirmed through research by the Court; the Court takes judicial notice of Plaintiff’s death for this case. *See Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007) (“The district court may take judicial notice of public records . . .”).

If a party dies while a claim is pending, the court may order substitution of the deceased party. FED. R. CIV. P. 25(a)(1); *Kuelbs v. Hill*, 615 F.3d 1037, 1042 (8th Cir. 2010). A motion for substitution may be made by any party or the decedent’s successor or representative. (*Id.*) If no motion for substitution has been made within 90 days of service of a statement noting the death, an action brought by the decedent must be dismissed. (*Id.*) More than 90 days have passed since Defendants filed a suggestion of death on October 2, 2019, and no motion for substitution has been made. Accordingly, this case should be dismissed.

IT IS THEREFORE RECOMMENDED THAT Plaintiff's Complaint (Doc. No. 2) be
DISSMSED without prejudice.

DATED this 2nd day of January 2020.



UNITED STATES MAGISTRATE JUDGE